

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

STEVEN OSCAR BLACKWELL AUSTIN, ) Case No.: 1:20-cv-01449-JLT (HC)  
Petitioner, )  
v. ) ORDER DIRECTING CLERK OF COURT TO  
STANISLAUS COUNTY SUPERIOR ) ASSIGN DISTRICT JUDGE  
COURT, )  
Respondent. ) FINDINGS AND RECOMMENDATION TO  
 ) DISMISS UNEXHAUSTED PETITION WITHOUT  
 ) PREJUDICE  
 )  
 ) [TWENTY-ONE DAY OBJECTION DEADLINE]

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Petitioner filed a Petition for Writ of Habeas Corpus on October 8, 2020. (Doc. 1.) On October 15, 2020, the Court issued an order to show cause why the petition should not be dismissed for failure to exhaust state remedies. (Doc. 5.) On November 17, 2020, Petitioner filed a response to the order to show cause, however, failed to indicate any information regarding exhaustion of his state remedies. (Doc. 8.) Accordingly, the Court will recommend that the petition be dismissed without prejudice.

**DISCUSSION**

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must summarily dismiss a petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . .” Rule 4; O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990). The Advisory Committee Notes to Rule 8 indicate that the Court may dismiss a petition for writ of habeas corpus,

1 either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an  
2 answer to the petition has been filed.

3       B.     Exhaustion

4       A petitioner who is in state custody and wishes to collaterally challenge his conviction by a  
5 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The  
6 exhaustion doctrine is based on comity to the state court and gives the state court the initial  
7 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501 U.S.  
8 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982).

9       A petitioner can satisfy the exhaustion requirement by providing the highest state court with a  
10 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.  
11 Henry, 513 U.S. 364, 365 (1995). A federal court will find that the highest state court was given a full  
12 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the  
13 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504  
14 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

15       Additionally, the petitioner must have specifically told the state court that he was raising a  
16 federal constitutional claim. Duncan, 513 U.S. at 365-66. In Duncan, the United States Supreme  
17 Court reiterated the rule as follows:

18       In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion of state  
19 remedies requires that petitioners "fairly present" federal claims to the state courts in  
20 order to give the State the "opportunity to pass upon and correct alleged violations of the  
21 prisoners' federal rights" (some internal quotation marks omitted). If state courts are to  
22 be given the opportunity to correct alleged violations of prisoners' federal rights, they  
23 must surely be alerted to the fact that the prisoners are asserting claims under the United  
24 States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a  
25 state court trial denied him the due process of law guaranteed by the Fourteenth  
26 Amendment, he must say so, not only in federal court, but in state court.

27       Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

28       Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his federal  
29 claims in state court *unless he specifically indicated to that court that those claims were*  
30 *based on federal law. See Shumway v. Payne*, 223 F.3d 982, 987-88 (9th Cir. 2000).  
31 Since the Supreme Court's decision in Duncan, this court has held that the *petitioner must*  
32 *make the federal basis of the claim explicit either by citing federal law or the decisions*  
33 *of federal courts, even if the federal basis is "self-evident," Gatlin v. Madding*, 189 F.3d  
34 882, 889 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982)), or the  
35 underlying claim would be decided under state law on the same considerations that would  
36 control resolution of the claim on federal grounds, *see, e.g., Hiivala v. Wood*, 195 F.3d

1 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31 (9th Cir. 1996); .

2 . . .

3 In Johnson, we explained that the petitioner must alert the state court to the fact that the  
4 relevant claim is a federal one without regard to how similar the state and federal  
standards for reviewing the claim may be or how obvious the violation of federal law is.

5 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added), *as amended by Lyons v.*  
6 Crawford, 247 F.3d 904, 904-5 (9th Cir. 2001).

7 Petitioner indicates that he did not seek review in the California Supreme Court on the form  
8 petition, however, he also includes an order from the California Supreme Court which denied a  
9 petition for review. (See Doc. 1 at 44, 53.) Petitioner also indicates on the form petition that he has a  
10 pending “direct appeal for restitution from resentencing hearing.” (See Doc. 1 at 45.) However, in his  
11 response to the order to show cause, Petitioner failed to provide any additional information regarding  
12 exhaustion of his state remedies. (See Doc. 8.) Accordingly, the Court must dismiss the petition.

13 Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir.  
14 2001). The Court cannot consider a petition that is unexhausted. Rose v. Lundy, 455 U.S. 509, 521-  
15 22 (1982).

## 16 ORDER

17 The Court DIRECTS the Clerk of Court to assign a district judge to the case.

## 18 RECOMMENDATION

19 Accordingly, the Court RECOMMENDS that the habeas corpus petition be SUMMARILY  
20 DISMISSED without prejudice for lack of jurisdiction.

21 This Findings and Recommendation is submitted to the United States District Court Judge  
22 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the  
23 Local Rules of Practice for the United States District Court, Eastern District of California. Within  
24 twenty-one days after being served with a copy, Petitioner may file written objections with the Court.  
25 Such a document should be captioned “Objections to Magistrate Judge’s Findings and  
26 Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. §  
27 636 (b)(1)(C).

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1 Failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

5 Dated: December 2, 2020

6 /s/ Jennifer L. Thurston  
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UNITED STATES MAGISTRATE JUDGE